In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No.

RUSSELL G. SMITH,
Petitioner (Appellant Below),

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent (Appellee Below).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion below, 139 Fed. (2d) ....., is not yet reported but appears in the record of this case at page 181.

II.

JURISDICTION.

The jurisdiction of this Court to review upon writ of certiorari a final determination of a United States Circuit Court of Appeals is set forth in the preceding petition for the writ which statement is here adopted as the statement as to jurisdiction and is therefore not repeated.

III.

STATEMENT OF THE CASE.

The material facts are set forth and the nature of the case is stated in the foregoing petition for a writ under the heading "Summary Statement of the Matter Involved". This statement is here adopted as the statement of the case and is therefore not here repeated.

IV.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals committed error in the following respects:

1. In affirming a judgment of the United States District Court which deprived petitioner of his liberty and which denied to petitioner the constitutional guaranties of due process.

2. In affirming a judgment of the United States District Court where the only evidence in the record

affirmatively established that Court to be without jurisdiction.

3. In affirming the judgment of the United States District Court by resorting to material not in the record before the said United States Circuit Court of Appeals and not within judicial notice.

V.

ARGUMENT.

(a) SUMMARY OF ARGUMENT.

Petitioner's argument in brief is as follows:

1. The deprivation of personal liberty by a Court having no jurisdiction, and where the record shows the Court to be without jurisdiction, is a denial of due process under the Constitution of the United States.

2. It is not contempt to violate an order which the court had no jurisdiction to issue.

3. Jurisdiction of the federal courts cannot be presumed and particularly cannot be sustained through the use of material not within judicial notice and outside of the record.

(b) THE DEPRIVATION OF PERSONAL LIBERTY BY A COURT HAVING NO JURISDICTION, AND WHERE THE RECORD SHOWS THE COURT TO BE WITHOUT JURISDICTION, IS A DENIAL OF DUE PROCESS UNDER THE CONSTITUTION OF THE UNITED STATES.

The requirement of due process in judicial proceedings is not only specifically set forth in the Fifth Amendment to the Constitution, but is inherent in the jurisprudence of the United States. The general principles have been stated by this Court and other courts many times. The expression "due process of law" means that there can be no proceeding against liberty or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights. (*Turpin v. Lemon,* 187 U. S. 51; *Endicott-Johnson Corp. v. Ency. Press,* 266 U. S. 285.) One of the most settled rules in the administration of justice in the United States is that any judgment must be supported by proof. (*The Hoppet v. United States,* 7 Cranch 389; *Lancaster v. Collins,* 115 U. S. 222.) This Court has on several occasions asserted another fundamental, i.e., that the Court determining the cause must have jurisdiction. (*Scott v. McNeal,* 154 U. S. 34; *Twining v. New Jersey,* 211 U. S. 78.)

In the case before this Court petitioner was cited on a charge of contempt arising out of a cause to which he was not a party. A separate proceeding to determine the alleged contempt of petitioner was instituted. In response to the order to show cause, petitioner filed a verified return in which he alleged under

oath certain facts which affirmatively established no jurisdiction in the District Court to issue the order which it was alleged that petitioner had not obeyed.

Petitioner in his return alleged under oath that the defendant bank, in the action to which he was not a party, and whose records were sought, had no employees engaged in interstate commerce. (R. 22.) As the principal action involved the Fair Labor Standards Act of 1938, this was the critical element as to the jurisdiction of the District Court. If true, the Court had no jurisdiction as the application of the Act is dependent on the character of the employees' activities. (*Kirschbaum v. Walling,* 316 U. S. 517; *Walling v. Jacksonville Paper Co.,* 317 U. S. Adv., 87 L. ed. 393.) The United States District Court disregarded entirely the evidence establishing no jurisdiction and no findings were made thereon. On a mere showing that petitioner had not complied with the order previously issued by the District Court and in face of his return showing no jurisdiction, he was declared to be in contempt and placed in custody for an indefinite period of time.

This Court has on various occasions defined in detail what it will require to satisfy the mandate of due process found in the Constitution. Minimum requirements are that the Court have jurisdiction and that judgment comply with proof. In general the language of this Court in *St. Joseph Stock Yards Co. v. United States* (1935), 298 U. S. 38, 77, is particularly pertinent. Here the Court said:

> "The first distinction is between issues of law and issues of fact. When dealing with constitutional rights (as distinguished from privileges accorded by the government * * *) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it. The second distinction is between the right to liberty of person and other constitutional rights * * * A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. And, so highly is this liberty prized that the opportunity must be accorded to any resident of the United States who claims to be a citizen."

Again in *Hovey v. Elliott* (1897), 167 U. S. 409, 414, this Court restated the fundamental requirements of due process:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. * * * A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and, when he has ap-

> peared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

The language in the above case applies directly to petitioner. The United States District Court said to petitioner, there shall be a hearing but there will be no consideration of evidence establishing no jurisdiction. The Circuit Court of Appeals has said there is a right of appeal, but on such appeal we will not consider whether the United States District Court was correct in ignoring the uncontradicted evidence which established the want of jurisdiction. The naked right of appeal is of no value unless at least the Appellate Court is willing to review and consider whether at least the fundamental elements of due process have been complied with. A case directly in point is *Cooke v. United States* (1925), 267 U. S. 517, 537, where this Court said:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and

in mitigation of the penalty to be imposed. See Hollingsworth v. Duane, Wall. Sr. 77, Fed. Cas. No. 6,616; Re Stewart, 118 La. 827, 43 So. 455; Re Clark, 208 Mo. 121, 15 L. R. A. (N.S.) 389, 106 S. W. 990.

"The proceeding in this case was not conducted in accordance with the foregoing principles. * * *

"The court proceeded on the theory that the admission that the petitioner had written the letter foreclosed evidence or argument. In cases like this where the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, the court cannot exclude evidence in mitigation. It is a proper part of the defense."

This Court in the *Cooke* case, which is one involving contempt, has directly stated that matters going to defense must be considered and that if there is an excuse the mere admission of noncompliance with an order is not sufficient to justify the commitment for contempt.

The plain unvarnished fact is that the record shows without conflict a complete defense which the Court ignored. This even under the most limited concept of the guaranties of our Constitution is lack of due process. In *Mooney v. Holohan* (1935), 294 U. S. 103, 112, this Court said:

"* * * the Attorney General contends that 'it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence

as he has, that it can be said that due process of law has been denied'.

"Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions."

Regardless of the fact that two courts have found petitioner to be guilty of contempt, the question is properly open for review by this Court because the record discloses without conflict that the judgment is erroneous. In *District of Columbia v. Pace* (Jan. 10, 1944), ... U. S. ....., Justice Jackson of this Court stated the rule as follows:

"when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous."

This is not a case involving a conflict of evidence or the weight thereof; it is a case where jurisdiction is conditioned upon certain facts and where the *sole evidence* as to said facts affirmatively established the lack of jurisdiction of the United States District Court.

This case not only is in absolute conflict with the decisions of this Court but is also of the utmost importance in the administration of justice because unless reversed it opens the doors in private litigation

to a situation where one may be placed in jail for an indefinite period without an opportunity to challenge the jurisdiction of the court so committing. This is not only shocking, it is unthinkable in the United States as of today; it is a reversion to the Star Chamber methods of the remote past. Certiorari is necessary to prevent a whittling away by judicial acquiescence of rights which we are now at war to preserve.

(c) IT IS NOT CONTEMPT TO VIOLATE AN ORDER WHICH THE COURT HAD NO JURISDICTION TO ISSUE.

That the question of jurisdiction of the United States District Court was of paramount importance and proper to be raised by petitioner in his defense is clear. This Court has time and time again stated that if the order disobeyed is issued by a court without jurisdiction, a judgment of contempt for failure to comply is void. In *Ex parte Sawyer* (1887), 124 U. S. 200, 222, this Court said:

> "The circuit court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction, it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void; their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged. *Ex parte Rowland*, 104 U. S. 604 [26:861]; *Ex parte Fisk*, 113 U. S. 713 [28:1117] * * *"

The *Sawyer* case is essentially similar to that of petitioner. Petitioner in a proceeding for an injunction failed to comply with a preliminary order in that suit to which he was not a party and presented uncontradicted evidence showing the United States District Court to be without jurisdiction. Under the *Sawyer* case this was a complete defense. Under the requirements of due process petitioner was entitled to make this defense which was ignored by the United States District Court. This improper action was affirmed by the United States Circuit Court of Appeals.

In *Ex parte Fisk* (1885), 113 U. S. 713, 718, the Court said:

> "When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, *the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void.*"

In *Beauchamp v. United States* (1935), 76 Fed. (2d) 663, 668, the Court said:

> "In order that disobedience of this injunction order may constitute contempt, it is necessary that the order be valid. Disobedience of a void mandate, order, judgment, or decree, or one issued by a court without jurisdiction of the subject-matter and parties litigant, is not contempt.
>
> "When '* * *' a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the

order punishing for the contempt is equally void. * * *' Ex parte Fisk, 113 U. S. 713, 5 S. Ct. 724, 726, 28 L. Ed. 1117; Ex parte Terry, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405; In re Ayers, 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216."

See also

Western Fruit Growers v. Gotfried (1943), 136 Fed. (2d) 98.

This principle is also expressly stated in the applicable statutes. Section 268 of the Judicial Code (28 USCA 385) defines the situations where the District Courts have power in relation to contempt. This section expressly limits the power to punish for disobedience of orders or decrees to *lawful* orders, rules or decrees and reads in part as follows:

"The said courts shall have power to * * * punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except * * * the disobedience or resistance * * * to any lawful writ, process, order, rule, decree, or command of the said courts."

Even where the proceeding is before a Senate Investigating Committee, which in its duty to determine facts for the purpose of evaluating proposed legislation must have broad powers, the same rule is applied. In *Sinclair v. United States* (1928), 279 U. S. 263, 292, this Court said:

"it must be exerted with due regard for the rights of witnesses, and that a witness rightfully

> may refuse to answer where the bounds of the power are exceeded or where the questions are not pertinent to the matter under inquiry."

In summary a complete defense to a charge of contempt is the establishment of the lack of jurisdiction of the court to issue the order which it is alleged that the contemnor has failed to obey. In the record of this case, involving petitioner, the lack of jurisdiction is affirmatively established without contradiction.

It should be emphasized that the case before this Court involves private litigation and is thus not similar to that of a grand jury where it has been said that because of the plenary investigative powers of the grand jury a witness may not challenge the authority of such grand jury. (*Blair v. United States,* 250 U. S. 273.)

(d) **JURISDICTION OF THE FEDERAL COURTS CANNOT BE PRESUMED AND PARTICULARLY CANNOT BE SUSTAINED THROUGH THE USE OF MATERIAL NOT WITHIN JUDICIAL NOTICE AND OUTSIDE OF THE RECORD.**

As already indicated, uncontradicted allegations of fact in a verified return filed in the United States District Court affirmatively established lack of jurisdiction. In order to sustain the jurisdiction of the District Court to sentence petitioner for contempt the United States Circuit Court of Appeals ignored the record on appeal and stated that jurisdiction was sustained because of assumed allegations in an assumed complaint in the principal cause out of which the contempt arose, to which petitioner was not a party.

The Circuit Court first states that petitioner is not a party to the principal cause, admits that the lack of jurisdiction was shown in the contempt proceeding, and then sustains jurisdiction in the contempt proceeding by reliance upon the complaint in the principal cause which was not in the record and to which petitioner was not a party. (R. 186, 187.) This departure from customary judicial procedure can be no better illustrated than by comparing the two statements found in the opinion of the Circuit Court and set forth below:

"*These individual contemnors are not parties to the main cause.* They have no appeal from the final judgment to be entered in it, and unless they can obtain a review of the orders now they will have no right of review at all. As to them the commitment orders are final."

"Their argument (appellants') is that the answers in the contempt proceeding (alleging that no employees of the Bank were engaged in interstate commerce) were not controverted in that proceeding, hence the court was shown to be without jurisdiction. *But the court's jurisdiction was to be determined, not by reference to what appellants might assert, but by reference to the complaint.*"

(R. 186,187; emphasis supplied.)

In this connection the determination of the United States Circuit Court of Appeals is contrary to the prior decisions of this Court and in conflict with the decisions in other circuits in two regards: First: Jurisdiction will never be presumed; secondly, the court may not go outside of the record and outside of judicial notice to supply defects in the record before it.

In relation to the first point that the record must affirmatively show jurisdiction, this Court said in *Lehigh Mining & Manufacturing Co. v. Kelly* (1895), 160 U. S. 327, 337:

> "But * * * when the inquiry involves the jurisdiction of a Federal court,—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record * * *"

Again in *Ex parte Smith* (1877), 94 U. S. 455, this Court said:

> "The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record of all suits prosecuted before them. *To this rule there are no exceptions.*
>
> "* * * There are no presumptions in favor of the jurisdiction of the courts of the United States."

See also *United States v. Green* (1939), 107 Fed. (2d) 19, 22, where the Court stated:

> "The District Courts of the United States are courts of limited jurisdiction, and the presumption at every stage of a cause is that the cause is outside the jurisdiction of a court of the United States unless the contrary appears from the record."

The case before this Court is not merely one where the record is silent or creates a conflict as to jurisdiction. It is one where the evidence in the record affirmatively established that the United States District Court had no jurisdiction.

In relation to the second point as to the right of the court to go outside of the record and judicial notice this Court and the various Circuit Courts of Appeals have been uniform to the effect that this may not be done. In *White v. Central Dispensary and Emergency Hospital* (1938), 99 Fed. (2d) 355, the court said:

> "And a court of appeals cannot take judicial notice of what may appear upon the records of the subordinate courts within the boundaries of its judicial jurisdiction; it can act only upon the facts appearing in the record before it. Fitzgerald v. Evans, 8 Cir., 49 F. 426, 1892; In re Manderson, 3 Cir., 51 F. 501, 1892; Divide Creek Irrigation Dist. v. Hollingsworth, 10 Cir., 72 F. 2d 859, 96 A. L. R. 937, 1934; Bush v. Tecumseh Nat. Bank, 64 Neb. 451, 90 N. W. 236, 1902."

An examination of the opinions of this Court has not revealed a single instance where the Court has considered the records of proceedings in lower courts unless the same were contained in the record. See *West Ohio Gas Co. v. Public Utilities Commission,* 294 U. S. 63. Also to the same effect, that an Appellate Court must restrict itself to the record, see *Pilger v. Sutherland,* 57 Fed. (2d) 604; *Chisholm-Ryder Co. v. Buck,* 65 Fed. (2d) 735.

In the instant case the United States Circuit Court of Appeals indicated that it obtained its extra record information from the briefs, at the same time acknowledging that this material was not in the record on appeal. (R. 182.) This is directly contrary to the determinations of other Circuits. See *Morris v. District of Columbia,* 124 Fed. (2d) 284. It is difficult to con-

ceive of a more dangerous practice on the part of an Appellate Court.

In brief the opinion of the Circuit Court of Appeals in this case is in conflict with the decisions of other circuits and with the determinations of this Court in that it indulges in presumptions not within judicial notice to sustain jurisdiction. This is, regardless of the other points made in this brief, such a departure from the usual and accepted course of judicial procedure as to call for intervention and control by this Court. If judicial review is to maintain any semblance of rationality and is not to be allowed to degenerate into determinations based upon assumption, surmise and conjecture, certiorari must be granted.

In conclusion it is emphasized that all of the argument here presented is concerned with two of the most important objectives of government: first, the proper administration of justice and, secondly, the preservation of civil liberties guaranteed by the Constitution of the United States. In this case the United States Circuit Court of Appeals has affirmed a judgment arising out of a hearing which did not follow the accepted principles of judicial procedure and in which petitioner was denied the constitutional guaranties of due process. Because of this, and because of the importance of the questions generally in the administration of justice in the federal courts, a review by certiorari should be granted.

(e) PRAYER.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record in all proceedings in the case numbered and entitled on its docket "No. 10,439, Russell G. Smith, Appellant, v. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee", and that the said decree of the said United States Circuit Court of Appeals for the Ninth Circuit be reversed by this Honorable Court and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Dated, San Francisco, California,
March 1, 1944.

Respectfully submitted,
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